

REMARKS/ARGUMENTS

Upon careful and complete consideration of the Office Action dated November 17, 2004, applicant has amended the claims which, when considered in conjunction with the comments herein below, are deemed to place the present application into condition for allowance. Applicant respectfully requests entry of the amendments and remarks and favorable reconsideration of this application, as amended, is respectfully solicited.

Before addressing the issues raised in the Office Action, applicant wishes to point out that the amendments made to the claims concern claims 1, 44, 45, 66, 113 and 114. Specifically, these claims have been amended to recite a "solid aerated mass or ground thereof," support for which can be found in the subject specification in Example 3 found on page 11. As such, applicant respectfully asserts that the amendments made herein are fully supported by the specification and do not include new subject matter.

The Office Action rejected claims 1, 5, 6-8, 9-13, 17-22, 26-28, 29, 33-37, 38-45, 66, 68-70, 74-77, 79-82, 86-90, 95-97 and 102-115 under 35 USC § 103(a) as allegedly unpatentable over U.S. Patent No. 4,798,733 to Kaneko et al. (hereinafter referred to as "Kaneko et al.").

The Examiner in making this rejection has asserted that Kaneko et al. teach a food modifier that has the same ingredients as the gluten substitute food ingredient that is presently claimed. The Examiner has further alleged that Kaneko et al. teach mixing the ingredients to thereby produce a food modifier in which air is incorporated and which thus constitutes an aerated mass. In fact, the Examiner stated in the final action that "[t]he claims do not define what aerated mass encompasses." Applicant respectfully submits that he has overcome the rejection of the claims by defining said "aerated mass".

It is respectfully submitted that Kaneko et al. only teach conditions that produce a food modifier in the form of a paste (see Kaneko et al., column 3, lines 63-66 for example).

That is, Kaneko et al. neither teach, nor reasonably suggest, heating a starch, an edible fat, an edible protein and a liquid for a time and under conditions sufficient to form a solid aerated mass, as now recited in the amended claims.

As is set forth in the M.P.E.P., §2142, it is well settled law that to “establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant’s disclosure.”

With respect to the first criterion and finding some suggestion or motivation in the references itself or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings to make obvious the claimed invention, it is respectfully submitted that the person skilled in the art would have understood that the pastes disclosed by Kaneko et al. were already effective for their use as food modifiers, and would thus have no motivation whatsoever to modify the recipes taught by Kaneko et al. to arrive at a solid aerated mass or a ground thereof. Moreover, a skilled artisan would have had no motivation at all on reading Kaneko et al. to employ temperatures that would result in the formation of a solid aerated mass.

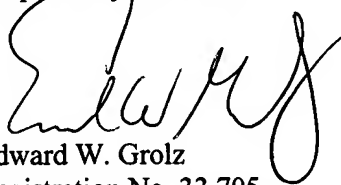
With respect to having a reasonable expectation of success, there would have been no such expectation to modify the temperature conditions as taught by Kaneko et al. to arrive at a food modifier with the same properties as those disclosed in the cited reference.

Finally, it is respectfully submitted that Kaneko et al. do not teach or suggest all the limitations of the claims as is required.

Apart from the above, it is further noted that in making a rejection under 35 U.S.C. §103, the Office Action must take into account the total teachings of the reference. As stated by the CAFC, each prior art reference must be evaluated as an entirety, and all of the prior art must be evaluated as a whole. See Panduit Corp. v. Dennison Mfg. Co., 774 F.2d 1082, 227 U.S.P.Q. 337 (Fed. Cir. 1985) and EWP Corp. v. Reliance Universal Inc., 755 F.2d 898, 225 U.S.P.Q. 20 (Fed. Cir. 1985). Consequently, it is respectfully submitted that one skilled in the art at the time the present invention was made who is only presented with Kaneko et al. would not even have attempted to employ temperatures that would have resulted in Kaneko et al. forming a solid aerated mass. Therefore, no matter what else Kaneko teaches, any rejection of the claims must fail based on the above-noted differences between the claimed invention and that which is taught by Kaneko et al. Consequently, it is respectfully requested that the rejection of the claims under 35 U.S.C. §103(a) be withdrawn.

In view of the above, it is respectfully submitted that all the claims in the application as presently amended contain patentable subject matter and a Notice of Allowance is earnestly solicited.

Respectfully submitted,



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